Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

SHIRISH WAGH,

Petitioner,

v.

METRIS DIRECT, INC.; METRIS DIRECT SERVICES, INC.; METRIS COMPANIES, INC.; DIRECTALERT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a holding by the Ninth Circuit that a district court's dismissal "with prejudice" of RICO claims under Rule 12(b)(6) is res judicata:

a. conflicting in principle with *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, wherein this Court held that a district court's dismissal of a diversity action on procedural grounds, i.e., statute of limitations, although expressly made "on the merits," was not necessarily claim-preclusive;

b. contrary to *Zhang v. Dept. of Labor & Immigration*, which was a federal-question case in which the Ninth Circuit cited *Semtek* as authority for its holding that a district court had erred in giving claim-preclusive effect to a commonwealth court's dismissal of an action on statute of limitations grounds;

c. productive of the sort of "forum-shopping . . . and . . . inequitable administration of the laws" that *Erie R. Co. v. Tompkins* seeks to avoid; and

d. unnecessarily unfair, within the meaning of *Zhang*, to plaintiffs who have commenced RICO actions in state courts and have had those actions remanded thereto, when they can satisfy those state courts' less rigorous requirements for stating a RICO claim?

2. Is the Ninth Circuit's recommendation that when plaintiffs anticipate that a district court will dismiss their RICO claims "on the merits" under Rule 12(b)(6), they should voluntarily dismiss those claims in order to preserve them for adjudication in a state court, likely simply to foster subsequent removals?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
TABLE OF APPENDICES	v
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THIS PETITION	3
I. THE NINTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT'S DISMISSAL BARS WAGH FROM PURSUING HIS RICO CLAIMS IN STATE COURT CONFLICTS IN PRINCIPLE WITH THIS COURT'S OPINION IN *SEMTEK*	8
II. THE NINTH CIRCUIT'S HOLDING ALSO CONFLICTS WITH ITS OWN DECISION IN *ZHANG*	9
III. THE NINTH CIRCUIT MADE NO ATTEMPT IN ITS AMENDED OPINION TO DISTINGUISH *SEMTEK*; RATHER, THE COURT SIMPLY DELETED ALL REFERENCES TO *SEMTEK* IN ITS NEW OPINION	10
IV. THE NINTH CIRCUIT'S RECOMMENDATION THAT LITIGANTS IN WAGH'S POSITION VOLUNTARILY DISMISS WILL FOSTER UNTOWARD RESULTS i.e., MULTIPLE REMOVALS	10
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Department of Revenue, 828 P.2d 1001 (1992) 3

Anderson v. Wolford, 604 N.E.2d 659 (1992) 3

Cartt v. Superior Court, 50 Cal.App.3d 960 (1975) 11

Deleage v. Rosenbluth, San Francisco Superior Court No. 315360 11

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 5

Gervase v. Superior Court, 31 Cal.App.4th 1218 (1995) 3, 4

Gross v. Cohen DuFour & Assocs., 642 A.2d 1074 (1993) 3

Haught v. Agricultural Prod. Credit Ass'n, 39 S.W.3d 252 (2000) 3

Kuhns v. Koessler, 880 P.2d 1293 (1994) 3

Midwest Heritage Bank, F.S.B. v. Northway, 576 N.W.2d 588 (1998) 3

People ex rel. Hartigan v. E. & E Hauling, Inc., 577 N.E.2d 1262 (1991) 3

Podraza v. Carriero, 630 N.Y.S.2d 163 (1995) 3

Semtek Int'l, Inc. v. Lockheed Martin Corp., 168 F.3d 501 (9th Cir. 1999) 8

Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) ..... *passim*

Springfield Housing Authority v. Burgos, 593 N.E.2d 1317 (1992) 3

Tafflin v. Levitt, 493 U.S. 455 (1990) 3, 4, 6, 7

TABLE OF AUTHORITIES – Continued

Page

Travelers Indem. Co. v. Merling, 605 A.2d 83 (1992)..... 3

Wagh v. Metris Direct, Inc., 348 F.3d 1102 (2003)..... 1

Wagh v. Metris Direct, Inc., 352 F.3d 1187 (2003)..... 1

Zhang v. Dept. of Labor & Immigration, 331 F.3d 1117 (9th Cir. 2003)..... 5, 9

STATUTES AND RULES

California Business & Professions Code

Section 17200..... 2

Section 17500..... 2

California Civil Code

Sections 1750, et seq..... 2

Rules of Civil Procedure

Rule 12(b)(6)..... 1, 6, 7, 11

Rule 41(a)(l) 12

Rule 41(b)..... 6, 7, 8

Title 18, United States Code

Sections 1961, et seq..... 2

Section 1962(c)..... 4

Title 28, United States Code

Section 1254(1)..... 2

Section 1441(b)..... 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

3 Schwarzer, Tashima & Wagstaffe, "Federal Civil Procedure Before Trial," Section 16:357, p. 16-141 12

TABLE OF APPENDICES

Appendix A – Order Amending Opinion And Denying Rehearing And Amended Opinion of the United States Court of Appeals for the Ninth Circuit dated and filed December 15, 2003 ..... App. 1

Appendix B – Opinion of the United States Court of Appeals for the Ninth Circuit dated and filed November 7, 2003... App. 20

Appendix C – Order Granting Defendants' Motion To Dismiss of the United States District Court for the Northern District of California dated and filed February 20, 2002 ..... App. 38

Appendix D – Order (Granting Appellant's Request for Judicial Notice) of the United States Court of Appeals for the Ninth Circuit dated and filed September 3, 2003 ..... App. 48

OPINIONS BELOW

On February 20, 2002, the United States District Court for the Northern District of California dismissed petitioner Shirish Wagh's RICO claims with prejudice under Rule 12(b)(6) for failure to state a claim. *Wagh v. Metris Direct, Inc.*, 2002 WL 257846 (N.D. Cal., Feb. 20, 2002). Appendix C, pp. 38-47. The district court remanded Wagh's state law claims to the Superior Court of the State of California, County of San Francisco, from whence respondents Metris had removed Wagh's action. *Ibid.*

On November 7, 2003, the United States Court of Appeals for the Ninth Circuit affirmed that judgment, holding that the dismissal with prejudice is res judicata. *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102 (9th Cir. 2003). Appendix B, pp. 20-37. Thereafter, Wagh petitioned for rehearing, solely upon the ground that the district court had erred in making its dismissal of his RICO claims "with prejudice," and that the circuit court had erred in holding that that dismissal is res judicata.

On December 15, 2003, in response to Wagh's petition, the Ninth Circuit ordered its opinion of November 7 amended, ordered Wagh's petition denied, and issued an amended opinion wherein, once again, it affirmed the district court's judgment, and held that the district court's dismissal with prejudice is res judicata. *Wagh v. Metris Direct, Inc.*, 352 F.3d 1187 (9th Cir. 2003). Appendix A, pp. 1-19.

JURISDICTION

The Ninth Circuit filed its original opinion on November 7, 2003. On December 15, 2003, the Ninth Circuit denied Wagh's timely petition for rehearing, ordered that its opinion of November 7 be amended, and issued its amended opinion. This Court has jurisdiction under 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

Petitioner Wagh filed this class action in the San Francisco County Superior Court with causes of action for fraud, money had and received, and declaratory relief. Appendix A, p. 4. Respondents Metris demurred to Wagh's complaint, and the superior court sustained that demurrer as to Wagh's fraud count, with leave to amend. *Ibid.* Wagh then filed a first amended complaint in which he substituted a cause of action for Metris's violation of the Consumers Legal Remedies Act, California Civil Code sections 1750, *et seq.*, for his fraud count. *Ibid.* Wagh also added causes of action for violations of the Unfair Business Practices Act, California Business & Professions Code sections 17200 and 17500, and of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961, *et seq. Ibid.*

Metris thereupon removed Wagh's action to the United States District Court for the Northern District of California pursuant to 28 U.S.C. section 1441(b), asserting federal-question jurisdiction. *Id.*, p.5. Wagh's RICO claims were the only claims over which the district court had original jurisdiction. Appendix C, p.46. Therefore, when that court dismissed those claims, it could decline

to exercise supplemental jurisdiction over Wagh's state law claims, and it did so. *Ibid.*

REASONS FOR GRANTING THIS PETITION

State and federal courts have concurrent jurisdiction over federal RICO actions. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). States in which plaintiffs have filed federal RICO actions in state courts include California (*Gervase v. Superior Court*, 31 Cal.App.4th 1218 (1995)), Illinois (*People ex rel. Hartigan v. E & E Hauling, Inc.*, 577 N.E.2d 1262 (1991)), Indiana (*Anderson v. Wolford*, 604 N.E.2d 659 (1992)), Iowa (*Midwest Heritage Bank, F.S.B. v Northway*, 576 N.W.2d 588 (1998)), *Maryland* (*Travelers Indem. Co. v. Merling*, 605 A.2d 83 (1992)), *Massachusetts* (*Springfield Housing Authority v. Burgos*, 593 N.E.2d 1317 (1992)), *Montana* (*Kuhns v. Koessler*, 880 P.2d 1293 (1994)), *New Jersey* (*Gross v. Cohen DuFour & Assocs.*, 642 A.2d 1074 (1993)), *New York* (*Podraza v. Carriero*, 630 N.Y.S.2d 163 (1995)), *Oregon* (*Anderson v. Department of Revenue*, 828 P.2d 1001 (1992)), and *Texas* (*Haught v. Agricultural Prod. Credit Ass'n*, 39 S.W.3d 252 (2000)).

Some of those state courts have issued opinions establishing various rules of procedure of their own for federal RICO causes of action. For example, in *Podraza v. Carriero, supra*, the Appellate Division of the New York Supreme Court chose a date of accrual for a RICO cause of action which was "most in accord with the policy of New York." Page 168. And in *Gervase v. Superior Court, supra*, the California Court of Appeal, in ordering that a peremptory writ of mandate issue directing the trial court to

vacate its order sustaining the demurrer to the plaintiffs' RICO cause of action, noted "the distinction between substantive law and matters of practice and procedure." Page 1229, fn.6. Continued the court (*ibid.*):

> The general rule is that when a federal cause of action is pursued in a state court, state law is controlling with respect to matters of practice and procedure, in the absence of any contrary provision in the federal statute.

Consonant with that observation, the court in *Gervase* held that (p.1236, fn.12):

> some authorities continue to suggest that a RICO enterprise must be shown to have an existence "separate and apart" from the racketeering activities in which it is claimed to have engaged. [Citations from California federal courts.] In our view, this reading of the RICO statute is erroneous.

In the case at bar, the Ninth Circuit affirmed the district court's dismissal of Wagh's section 1962(c) RICO claim for exactly that reason, i.e., that he had failed to allege a structure of the enterprise for the making of decisions which is "separate and apart" from the racketeering activities. Appendix A, p.17. And the Ninth Circuit held that "[e]ven though state courts have concurrent jurisdiction over RICO claims," citing *Tafflin, supra*, "given the pleading flaws in this case, res judicata bars Wagh from reasserting his RICO claims in state court." *Id.*, pp.18-19.

That holding conflicts in principle with this Court's holding in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), is contrary to the Ninth Circuit's own

holding in *Zhang v. Dept. of Labor & Immigration*, 331 F.3d 1117 (9th Cir. 2003), results in the very forum shopping and inequitable administration of the laws which this Court sought to avoid by its decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and is unnecessarily unfair, within the meaning of *Zhang*, to plaintiffs who have commenced RICO actions in state courts and have seen those actions removed and then remanded, when they can satisfy those states' less rigorous requirements for pleading a RICO claim.

Following the Ninth Circuit's holding of claim-preclusion, the court sought to ameliorate its harshness by recommending that plaintiffs who anticipate such a result may "voluntarily dismiss the claims so as to avoid" it, thereby enabling them to pursue those claims in state court. Appendix, p.19. But such a course of action simply would exacerbate a bad situation by almost guaranteeing a subsequent removal, with its attendant increase in litigation.

Not only does the Ninth Circuit's holding herein conflict with others, both of its own and of this Court, but it involves a frequently recurring situation in which other courts will rely upon that holding. Hence, it is a matter of exceptional importance and of national significance, and one that will have substantial impact upon the administration of justice throughout the circuits.

On November 7, 2003, the Ninth Circuit filed its original opinion herein. Appendix B. The last two paragraphs thereof read as follows (*id.*, pp.36-37):

> The district court's Rule 12(b)(6) dismissal with prejudice operates as an adjudication on the merits of the claims under Fed. R. Civ. P. 41(b). Even though state courts have concurrent jurisdiction over RICO actions, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), res judicata bars Wagh from reasserting his RICO claims in state court.
>
> At no point did Wagh request that any of his RICO claims be dismissed without prejudice so that he could pursue them in state court, nor did he voluntarily dismiss the claims so as to avoid the preclusive effect of a dismissal on the merits by the district court. *See Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (noting that a dismissal without prejudice "will also ordinarily . . . have the consequence of not barring the claim from other courts"). Wagh is bound by the district court's determination of the insufficiency of his factual allegations.

Prior to the Ninth Circuit's citation of *Semtek* in its opinion of November 7, neither any court nor any party herein had made any reference to *Semtek*.

On November 21, 2003, Wagh petitioned the panel for a rehearing. In that petition, Wagh pointed out that the panel had misapprehended this Court's decision in *Semtek*. Indeed, argued Wagh, *Semtek* required a holding by the Ninth Circuit that the district court's dismissal of Wagh's RICO claims on procedural grounds did not bar his pursuing those claims in state court.

On December 15, 2003, the panel filed its amended opinion. Appendix A. In it, the panel added a seven-word phrase (shown in bold face type in the quotation below)

to the next-to-last paragraph, and deleted the last paragraph, of its original opinion. The panel then added two new paragraphs in its amended opinion. Thus, the last three paragraphs of that amended opinion read as follows (*id.*, pp. 18-19):

> The district court's Rule 12(b)(6) dismissal with prejudice operates as an adjudication on the merits of the claims under Fed. R. Civ. P. 41(b). Even though state courts have concurrent jurisdiction over RICO actions, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), **given the pleading flaws in this case**, res judicata bars Wagh from reasserting his RICO claims in state court.
>
> In his response to the first motion to dismiss his RICO claims, Wagh requested that the district court dismiss his §1962(a) claim without prejudice, asserting that discovery would enable him to plead this claim with greater specificity. The district court's decision to dismiss this claim with prejudice was not an abuse of its discretion. Wagh argues here, as he did before the district court, that he would be able to amend his §1962(a) claim if the district court allowed discovery. As we discussed above, however, Wagh was not entitled to conduct discovery at this stage of the proceedings because no factual issues were in dispute.
>
> Furthermore, at no point did Wagh request that any of his other RICO claims be dismissed without prejudice so that he could pursue them in state court, nor did he voluntarily dismiss the claims so as to avoid the preclusive effect of a dismissal on the merits.

I. The Ninth Circuit's Holding That The District Court's Dismissal Bars Wagh From Pursuing His RICO Claims In State Court Conflicts In Principle With This Court's Opinion In *Semtek*

In *Semtek*, the defendant had removed the action from state court on the basis of diversity of citizenship. Thereafter, the United States District Court for the Central District of California dismissed the suit "on the merits," based upon California's two-year statute of limitations. The Ninth Circuit affirmed at 168 F.3d 501. The plaintiff also sued the defendant in a state court in Maryland, alleging the same causes of action. Those counts were not time barred under Maryland's three-year statute of limitations. Nevertheless, the Maryland trial court dismissed the suit on the ground of res judicata, and the Maryland appellate court affirmed. It held that regardless of whether or not California would have accorded claim-preclusive effect to a statute-of-limitations dismissal by one of its own courts, the Maryland suit was barred by the California federal court's dismissal, because under federal law, that dismissal was on the merits and was claim-preclusive. On **certiorari**, this Court reversed and remanded. In a unanimous opinion by Justice Scalia, it held that a judgment "on the merits" is not necessarily a judgment entitled to claim-preclusive effect. P. 503.

Continued this Court (page 506):

> We think, then, that the effect of the "adjudication upon the merits" default provision of Rule 41(b) – and, presumably, of the explicit order in the present case that used the language of that default provision – is simply that, unlike a

> dismissal "without prejudice," the dismissal in the present case barred refiling of the same claim in the United States District Court for the Central District of California. That is undoubtedly a necessary condition, but it is not a sufficient one, for claiming preclusive effect in other courts. [Footnote omitted.]

II. The Ninth Circuit's Holding Also Conflicts With Its Own Decision In *Zhang*

Zhang v. Dept. of Labor & Immigration, 331 F.3d 1117 (9th Cir. 2003), like this, was a federal-question case. In *Zhang*, the Ninth Circuit cited *Semtek* for the proposition that a dismissal on statute of limitations grounds generally does not prevent the pursuit of an identical action in a different forum where no procedural bar exists. Additionally, in *Zhang* the Ninth Circuit held that res judicata should not apply to a previous dismissal that was based upon the statute of limitations if the effect of the bar would be unfair.

Surely, here, where the dismissal was based upon a pleading requirement which is peculiar to the dismissing forum, that dismissal should have no more preclusive effect in another forum with a different pleading requirement than does a dismissal which is based upon a different limitations period. Holding that the district court's dismissal of Wagh's RICO claims on procedural grounds bars him from reasserting those claims in state court (1) conflicts in principle with *Semtek*, (2) is contrary to *Zhang*, and (3) is just as unfair as the holding which the Ninth Circuit reversed in *Zhang*.

III. The Ninth Circuit Made No Attempt In Its Amended Opinion To Distinguish *Semtek*; Rather, The Court Simply Deleted All References To *Semtek* In Its New Opinion

The Ninth Circuit's issuance of an amended opinion demonstrates that it believed Wagh's petition for rehearing to have merit. Furthermore, it was the Ninth Circuit itself which, in its original opinion, had introduced *Semtek* to this proceeding. Had that court believed Wagh to be wrong in his assertion that *Semtek* required the abandonment of the court's holding regarding res judicata, the court would not have jettisoned *Semtek*. Rather, the court would have reasserted its reliance upon *Semtek*, and would have explained why Wagh's analysis thereof was wrong. Wagh respectfully submits that the Ninth Circuit did not distinguish *Semtek* in its amended opinion because it could not.

IV. The Ninth Circuit's Recommendation That Litigants In Wagh's Position Voluntarily Dismiss Will Foster Untoward Results, i.e., Multiple Removals

In the Ninth Circuit's original opinion, it suggested that, as an alternative to requesting dismissal without prejudice, Wagh could voluntarily have dismissed his RICO claims. Appendix B, pp. 36-37. That, according to the court, would have avoided "the preclusive effect of a dismissal on the merits," with "'the consequence of not barring the claim from other courts.'" *Ibid.*, quoting from *Semtek*.

But, as Wagh pointed out in his petition for rehearing, that course of action would invite a result precisely the

opposite of that which likely would flow from a dismissal without prejudice. Thus, if the plaintiff in any federal court were to voluntarily dismiss his RICO claims, and then, following remand because of the absence of a federal question, were to replead those claims in a state court, the defendants, in all likelihood, would remove again. That would be the wholly foreseeable, but wasteful and untoward, result of the Ninth Circuit's improvident recommendation.

To the contrary, if, following removal, a district court were to dismiss a plaintiff's RICO counts without prejudice because of the plaintiff's failure to state a **federal** claim, and then were to remand to the state court, "only an extraordinarily wealthy, quixotic, and masochistic [defendant] would undertake such a fruitless endeavor" as to remove that same claim again. *Cartt v. Superior Court*, 50 Cal.App.3d 960, 969, fn. 15 (1975).

On September 3, 2003, at Wagh's request, the Ninth Circuit took judicial notice of pleadings from *Deleage v. Rosenbluth*, San Francisco Superior Court No. 315360. Appendix D. In *Deleage*, the defendants, represented by a venerable and sophisticated San Francisco law firm, chose not to remove an action in which the plaintiff had pleaded a RICO claim. However, it is clear that if this Court leaves intact the Ninth Circuit's holding that a Rule 12(b)(6) dismissal with prejudice has claim-preclusive effect, only the most naive of defendants will, hereafter, fail to remove in any case where removal arguably is available. That, Wagh respectfully submits, is not a result which any federal court should be fostering.

Wagh, in his petition for rehearing, made every argument which he sets forth above. Nevertheless, in the

Ninth Circuit's amended opinion, it held, once again, that "res judicata bars Wagh from reasserting his RICO claims in state court." Appendix A, p. 19. That holding is wrong.

Both in the Ninth Circuit's original opinion, and in its amended opinion, it correctly asserted that "[a]t no point did Wagh . . . voluntarily dismiss the claims so as to avoid the preclusive effect of a dismissal on the merits." Appendix B, page 36; Appendix A, page 19. But a plaintiff must seek court approval for the dismissal of a purported class action, which this is. Rule 41(a)(1). And the court may order that the dismissal be with prejudice, even though the plaintiff has moved for dismissal without prejudice. 3 Schwarzer, Tashima & Wagstaffe, "Federal Civil Procedure Before Trial," §16:357, p. 16-141. In view of the district court's dismissal of all of Wagh's RICO claims with prejudice, despite his request to the contrary at least as to one, it is clear that Wagh could not have saved any of his claims by utilizing the stratagem suggested by the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Wagh respectfully requests this Court to grant this petition.

DATED: March 15, 2004

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SHIRISH WAGH, *Plaintiff-Appellant,* v. METRIS DIRECT, INC.; METRIS DIRECT SERVICES, INC.; METRIS COMPANIES, INC.; DIRECTALERT, *Defendants-Appellees.*	NO. 02-15580 D.C. No. CV-01-01711-TEH ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
October 7, 2003 – San Francisco, California

Filed November 7, 2003
Amended December 15, 2003

Before: Betty B. Fletcher, A. Wallace Tashima, Circuit Judges, and Louis H. Pollak, District Judge.*

Opinion by Judge B. Fletcher

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* The Honorable Louis H. Pollak, Senior United States Distirct Judge for the Eastern District of Pennsylvania, sitting by designation.

Tomio B. Narita and David B. Moyer, San Francisco, California, for the defendants-appellees.

ORDER

This court's opinion, filed November 7, 2003, is amended as follows:

1. The last full paragraph of the opinion, on slip op. 15949, is deleted and replaced with the following two paragraphs:

   In his response to the first motion to dismiss his RICO claims, Wagh requested that the district court dismiss his § 1962(a) claim without prejudice, asserting that discovery would enable him to plead this claim with greater specificity. The district court's decision to dismiss this claim with prejudice was not an abuse of its discretion. Wagh argues here, as he did before the district court, that he would be able to amend his § 1962(a) claim if the district court allowed discovery. As we discussed above, however, Wagh was not entitled to conduct discovery at this stage of the proceedings because no factual issues were in dispute.

   Furthermore, at no point did Wagh request that any of his other RICO claims be dismissed without prejudice so that he could pursue them in state court, nor did he voluntarily dismiss the claims so as to avoid the preclusive effect of a dismissal on the merits.

2. The last sentence of the penultimate paragraph of the opinion, which currently reads:

> Even though state courts have concurrent jurisdiction over RICO actions, *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990), res judicata bars Wagh from reasserting his RICO claims in state court.
>
> should be replaced with this sentence:
>
> Even though state courts have concurrent jurisdiction over RICO actions, *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990), given the pleading flaws in this case, res judicata bars Wagh from reasserting his RICO claims in state court.

With the opinion as amended, the panel has voted to deny the petition for panel rehearing. The petition for rehearing, filed November 21, 2003, is DENIED.

OPINION

B. FLETCHER, Circuit Judge:

Plaintiff-Appellant Shirish Wagh appeals the United States District Court's Fed. R. Civ. P. 12(b)(6) dismissal of his civil RICO action against Metris Direct, Inc.; Metris Direct Services, Inc.; Metris Companies, Inc.; and Direct-Alert ("Defendants-Appellees" or "Metris Direct") for failure to state a claim. Wagh argues that the district court erred in dismissing with prejudice his claims brought under 18 U.S.C. § 1962(a)-(d). We affirm.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction under 28 U.S.C. § 1291 over an appeal from a district court's dismissal of an action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

We review de novo a dismissal for failure to state a claim, *see Cervantes v. United States,* 330 F.3d 1186, 1187 (9th Cir. 2003), but review denials of discovery and leave to amend for abuse of discretion, *see Panatronic USA v. AT&T Corp.,* 287 F.3d 840, 846 (9th Cir. 2002); *Nat'l Audubon Soc'y, Inc. v. Davis,* 307 F.3d 835, 853 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002).

FACTUAL AND PROCEDURAL BACKGROUND

Wagh filed this action against Metris Direct in California Superior Court, County of San Francisco, alleging that Metris Direct had caused Citibank, his credit card issuer, to bill Wagh $119.95 for membership in DirectAlert, an organization which provides credit protection. Wagh alleged that he had not contracted for membership in DirectAlert. In his initial complaint, Wagh sued Metris for fraud, money had and received, declaratory and injunctive relief, and compensatory and punitive damages. Wagh sued on behalf of himself and all others whom he alleged Metris had improperly caused to be billed for such memberships.

After Metris's successful demurrer to Wagh's fraud claim, Wagh filed a first amended complaint in state court. In addition to the remaining original claims for money had and received, and declaratory relief, Wagh alleged that Metris had violated the Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.*; the Unfair Business Practices Act, CAL. BUS. & PROF. CODE §§ 17200, 17500; and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* Specifically, Wagh alleged that Metris Direct had violated 18 U.S.C. § 1962(c), which

prohibits participation in activities constituting "a pattern of racketeering activity or collection of unlawful debt."

Metris Direct removed Wagh's action to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441(b), asserting federal question jurisdiction. The district court sua sponte ordered Wagh (a) to show cause why his RICO cause of action should not be dismissed for failure to state a claim; (b) to show why in the absence of the RICO claim, the court should not dismiss the case for lack of subject matter jurisdiction; and (c) in the event that he could state a claim under RICO, to file a RICO case statement pursuant to the court's RICO Standing Order.

Wagh filed an amended RICO case statement and, later, an amended complaint.[1] In his amended case statement, Wagh alleged *inter alia* that the Appellees had committed mail fraud because they "caused, and are causing, bills for products and/or services . . . to be sent to plaintiff and the members of his class by the United States Mail. Because none of those recipients either has contracted, or is indebted, therefor, each of those millions of bills has been and is being sent in violation of 18 U.S.C. section 1341." Additionally, Wagh now claimed that Metris Direct had violated all the subsections of the RICO statute.

Metris filed a response to the amended RICO case statement, arguing that Wagh had not stated and could not state a claim under any of the four subsections of the

[1] Wagh had filed a RICO case statement two days earlier, but then filed an amended case statement.

RICO statute. The district court ruled that it would construe Metris Direct's response as a motion to dismiss, and ordered Wagh to respond to the motion. Wagh responded, arguing that he had stated a claim under § 1962(b), (c), and (d), and that if the court dismissed his § 1962(a) claim, it should do so without prejudice.

The district court granted Metris Direct's motion to dismiss, finding that Wagh had failed to plead the RICO mail fraud claim with the requisite specificity. The court found that Wagh would not be able to amend his § 1962(a) and (b) claims, and therefore dismissed them with prejudice. Because his § 1962(c) and (d) claims could be amended to correct the pleading defect, however, the court dismissed them with leave to amend.

Wagh filed a motion for relief from the district court's order, claiming that the court was mistaken in its assertion that, at oral argument on the motion to dismiss, he had conceded inability to cure the pleading defects under § 1962(b) without discovery. The court dismissed the motion for relief from the order under its local Civ. L.R. 7-9(a) because Wagh had failed to obtain leave of the court to file such a motion.

Wagh then filed a second amended complaint in district court, in which he restated his § 1962(c) and (d) claims and sought declaratory and injunctive relief. He now alleged, as a predicate for his RICO claims, that the defendants-appellees had violated 18 U.S.C. § 1343, which prohibits wire fraud, because they "caused, and are causing, bills for products and/or services . . . to be sent to Citibank by wire." The court dismissed Wagh's RICO claims with prejudice, declined to exercise supplemental jurisdiction over the state law claims, and remanded the

case to San Francisco Superior Court. *Wagh v. Metris Direct, Inc.*, 2002 WL 257846 (N.D. Cal., Feb. 20, 2002). Wagh appealed.

DISCUSSION

I. The RICO Standing Order

Wagh argues that the district court's use of the RICO Standing Order applies the heightened pleading standards prohibited by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). This is essentially a challenge to the Standing Order as being in conflict with Fed. R. Civ. P. 8(a). As far as can be determined, this court has never before ruled on the compliance of RICO standing orders with the basic pleading requirements of Rule 8(a) or the stricter pleading requirements of Rule 9(b).

Some district judges in at least four districts in the Ninth Circuit use RICO standing orders. Individual judges in the Northern, Central, and Southern Districts of California, and the District of Hawai'i have issued orders that direct plaintiffs claiming RICO violations to state their allegations in detail and with specificity, including a detailed description of the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. *See Gutierrez v. Givens,* 1 F. Supp. 2d 1077, 1087 (S.D. Cal. 1998) (describing the purpose of such orders as providing "notice to the defendant and the filtering out of meritless complaints"); *May v. U.S. Chamber of Commerce,* 1996 WL 116829 (N.D. Cal. 1996) (ordering the plaintiff to "include a RICO statement consistent with the standing orders of the court"); *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365 (D. Hawai'i, 1995) (stating that RICO plaintiffs are required, by a standing order of the court, to file a

RICO case statement within 30 days of filing the complaint); *In re Bank of Credit and Commerce Int'l Depositors Litig.*, 1992 WL 696398 (C.D. Cal. 1992) (referring to the Order used in that case).

According to a leading treatise on civil RICO actions, "[m]any federal district courts have issued standing orders in civil RICO cases requesting that plaintiff's counsel provide certain details concerning their RICO claim." DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO App. 9A, 9-100.17 (March 2003) (citing 15 different district courts, in the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, as among those that issue RICO Standing Orders). Most district courts, including the district court in this case, either adopt verbatim or use a version of the standing order issued by Judge Alvin Krenzler in *Lyman Steel Co. v. Shearson Lehman Bros., Inc.*, Civ. No. C-86-355, 1986 U.S. Dist. LEXIS 29346 (N.D. Ohio 1986).

Despite the widespread use of these orders, however, only three circuits have either directly or indirectly addressed the question of their compliance with notice pleading requirements. In *Figueroa Ruiz v. Alegria,* the First Circuit affirmed in relevant part the district court's dismissal with prejudice of RICO claims for failure to comply with its order "calling for detailed explication of the factual underpinnings of the RICO claims." 896 F.2d 645, 646 (1st Cir. 1990). Upholding the lower court's use of the order to compel greater specificity in the plaintiffs' complaint, the court held that the "need for expeditious and orderly progress of . . . litigation" is particularly pronounced in a civil RICO suit because of its "quasi-criminal" nature and consequent "stigmatizing effect on those named as defendants." *Id.* at 650. Courts should

therefore "strive to flush out frivolous RICO allegations at an early stage of the litigation." *Id.* The court found that the order was designed with this goal in mind, and therefore found no abuse of discretion in the district court's dismissal of the RICO claims.[2]

The Fifth Circuit has also upheld the use of RICO standing orders at least three times. In *Old Time Enterps. v. Int'l Coffee Corp.*, it held that the district court did not err in "requiring a more specific, clear, and direct statement of the RICO claims." 862 F.2d 1213, 1217 (5th Cir. 1989). Noting that "the Standing Order [served the plaintiff] with notice of the requirements for pleading a RICO claim in accordance with the relevant substantive and procedural rules," *id.* at 1218, the court affirmed the dismissal for failure to state a claim. *Id.* at 1218-19. The court again rejected a challenge to a standing order as being in conflict with Rule 8(a) in *Elliott v. Foufas*, where it held that the order was "entirely consistent with the requirements of Rule 8 that pleadings contain a plain statement of the claim and that pleadings be direct and concise." 867 F.2d 877, 880 (5th Cir. 1989). In late 1990, asserting that such orders are a "useful, sometimes indispensable, means to understand the nature of the claims asserted and how the allegations satisfy the RICO statute," the court wrote that "[t]he propriety of a district court's requirement of a case statement to summarize the nature of RICO claims is . . . well-established in this

[2] This standard of review was applied because the district court had dismissed the complaint with prejudice under Fed.R.Civ.P. 41(b) for lack of prosecution and disregard of a court order.

circuit." *Marriott Brothers v. Gage,* 911 F.2d 1105 (5th Cir. 1990).

The Second Circuit, however, has adopted a more cautious approach to the use of such standing RICO orders. In *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.,* the district court had dismissed the RICO claim on the alternative ground that the plaintiff had violated its standing order and therefore failed to "furnish information relating to the claim." 271 F.3d 374, 385 (2d Cir. 2001). The court found that the "Standing Order call[ed] for information far in excess of the essential elements of a RICO claim. . . . To the extent [the order] called for presentation of information going beyond what a plaintiff needs to present to establish a legally sufficient case, plaintiff's inability to produce it could not justify the grant of judgment to defendant." *Id.* at 386.

One key distinction between the First and Fifth Circuit cases on one hand, and the Second Circuit case on the other, is that the former deal with situations in which the alleged predicate offenses were mail or wire fraud, while the latter discussed an action in which the underlying offense was a violation of the Immigration and Nationality Act. As both the First and Fifth Circuits recognized, complaints alleging fraud must comply with both Fed. R. Civ. P. 8(a) *and* 9(b). *See Figueroa Ruiz,* 896 F.2d at 648 n.3; *Old Time Enterps.,* 862 F.2d at 1217. That is, not only must the statement of the claim "show[] that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), but "the circumstances constituting fraud . . . [must] be stated with particularity." Fed R. Civ. P. 9(b). It is therefore likely that the holdings in the cases affirming the use of RICO Standing Orders were, at least in part, based on the fact that the plaintiffs had failed to plead the fraud claims in sufficient detail.

We find the reasoning of the Second Circuit persuasive. The use of RICO Standing Orders to compel plaintiffs to produce detailed RICO Case Statements, which are then treated by the district court as part of that party's pleadings, can in certain circumstances require far more information from plaintiffs than is required under either Rule 8(a) or 9(b) of the Federal Rules. Nevertheless, in this case, we hold that Wagh's pleadings failed to satisfy even the basic requirements of those rules, and that the dismissal for failure to state a claim was therefore correct.

II. Wagh's RICO claims

A. Wagh's § 1962(a) claim

18 U.S.C. § 1962(a) provides in relevant part:

> It shall be unlawful for any person who has received any income derived, . . . from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise.

Section 1964(c) confers standing to bring civil RICO claims only upon those persons "injured in [their] business or property by reason of a violation of section 1962." Read together, these two provisions require that "a plaintiff seeking civil damages for a violation of § 1962(a) must allege facts tending to show that he or she was injured by the use or investment of racketeering income." *Nugget Hydroelectric L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir. 1992) (joining three other circuits in their application of the 'investment injury' requirement). *See also* SMITH & REED ¶ 6.04[5][a], at 6-101 (listing the cases in

which four additional circuits imposed an 'investment injury' requirement for § 1962(a) standing, bringing the total to eight circuits).

Wagh argues that the district court misapplied *Nugget* by requiring him to plead that he was injured by the use or investment of the funds taken from him. Instead, he urges this court to hold that he need only allege that he was injured by the use or investment of funds previously received from others in violation of the mail fraud, wire fraud, and RICO statutes, and that his allegation that the appellees "reinvest in themselves" the income generated by "the enterprise's pattern of racketeering activity," is therefore sufficient to state a claim.

We disagree, for several reasons. First, both the Supreme Court and this court have held that under § 1964(c), a RICO plaintiff must allege a direct causal link between his injury and the defendant's violation. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992) (rejecting a reading of the statute that would allow recovery "simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but-for' cause of plaintiff's injury"); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1419 (9th Cir. 1995) ("In order to plead a civil RICO claim, appellants must show that the defendants' violation of section 1962 was the proximate cause of their injury.").

Second, in *Nugget* we specifically refused to follow the approach of the Fourth Circuit, which had held that a plaintiff may satisfy the standing and pleading requirements for RICO violations by alleging an injury from racketeering acts generating income that was *subsequently* used in violation of § 1962. *Nugget*, 981 F.2d at 437 (declining to

adopt the reasoning in *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990)). *Nugget's* holding is applicable here. Noting that *Busby* allowed recovery although "one element of the violation, the use of the proceeds, may not have contributed to or caused the injury," this court concluded that

> [S]ection 1964(c) does not support such a reading, for it would allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a) even though section 1964(c) speaks not of an 'element of a violation' but rather only of a 'violation.' To allow recovery for an injury arising from a mere element of a violation, rather than an actual violation, of section 1962(c), we would have to have before us a statute worded differently from the one Congress passed.

Id.

Wagh's argument that he should be allowed to recover for an injury arising from the investment of income gained from a *previous* act of racketeering is similarly unavailing. He has asserted that Metris Direct defrauded him, but has failed to assert that they have injured him by the use or investment of the income derived from the predicate acts of fraud. He has therefore alleged only an element of the RICO violation covered by § 1962(a).

Wagh's reinvestment theory fares no better. Several courts, applying an investment injury requirement, have held that "the acquisition and reinvestment of the proceeds of racketeering activity in the general affairs of an enterprise" does not qualify as investment injury. *See* SMITH & REED ¶ 6.04[5][a], at 6-104 n.226 (citing one Eighth Circuit case, and four district court cases from

three different circuits, including *In re Rexplore, Inc. Sec. Litig.*, 685 F. Supp. 1132, 1141 (N.D. Cal. 1988)).

We therefore hold that for Wagh to have standing to sue under §§ 1962(a) and 1964(c), he must have alleged that funds derived from the alleged racketeering activity (mail fraud) were used to injure him. Since Wagh conceded below that he was unable to amend his complaint without discovery, the only remaining question on his § 1962(a) claim is whether he was entitled to discovery.

The district court found that Wagh was not entitled to conduct discovery in order to cure the § 1962(a) pleading defect. As the court noted in its order granting the first motion to dismiss, discovery at the pleadings stage is only appropriate where factual issues are raised by a Rule 12(b) motion. (citing *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987)). There are no factual issues in dispute with regard to this claim; even if accepted as true, Wagh's allegations are insufficient to state a claim for relief under § 1962(a). The district court did not abuse its discretion in finding that Wagh was not entitled to discovery.

B. Wagh's § 1962(b) claim

18 U.S.C. § 1962(b) provides in relevant part:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

In order to state a claim under § 1962(b), a plaintiff must allege that "1) the defendant's activity led to its control or acquisition over a RICO enterprise, and 2) an

injury to plaintiff resulting from defendant's control or acquisition of a RICO enterprise." *Sebastian Int'l, Inc. v. Russolillo,* 186 F.Supp.2d 1055, 1068 (C.D. Cal. 2000) (internal citations omitted). This pleading requirement means that in addition to alleging facts sufficient to assert standing, Wagh must allege "a specific nexus between the control of the enterprise and the racketeering activity." *Sea-Land Serv., Inc. v. Atlantic Pacific Int'l,* 57 F.Supp.2d 1048, 1055 (D. Hawai'i 1999).

Wagh argues that the district court's dismissal without leave to amend was in error, because although he believes that he has already stated a claim for relief under § 1962(b), he would also be able to amend his pleading to satisfy any stricter requirements imposed by the district court, without needing discovery.

Leave to amend is generally within the discretion of the district court. *See, e.g., Nat'l Audubon Soc'y,* 307 F.3d at 853. The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint. *See, e.g., Chodos v. West Publ'g Co.,* 292 F.3d 992, 1003 (9th Cir. 2002).

Nearly four months passed between April 4, 2001, when Wagh first asserted a RICO claim (under § 1962(c), not § 1962(b)), and July 25, when he responded to the district court's order to show cause. Wagh first claimed a violation under § 1962(b) on July 25 in his amended RICO case statement, but did not include more than the vaguest allusions to the acquisition or maintenance of any interest in or control of the alleged enterprise. Moreover, although Wagh maintains that he is able to amend his pleadings to state a claim under § 1962(b), he has given no indication – either in argument before the district court, or in his briefs

to this court – what additional details he could provide without discovery. Given the length of time that Wagh has alleged a violation of the RICO statute (albeit a different section), and the paucity of facts that would establish the bare bones of his claim, we conclude that the district court did not abuse its discretion in dismissing Wagh's § 1962(b) claim without granting leave to amend.

C. Wagh's § 1962(c) claim

18 U.S.C. § 1962(c) provides in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"For the purposes of section 1962(c), RICO plaintiffs must allege a defendant – the 'person' or 'persons' – who is distinct from the enterprise whose business the defendant is conducting." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992). The term "enterprise" is defined in the statute as (1) "any individual, partnership, corporation, association, or other legal entity" and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (West 2003). Wagh's only theory of enterprise on appeal is that the defendants-appellees, two of their employees, and Citibank together constitute the enterprise. He therefore alleges that these corporations and individuals have formed an association in fact.

Under this Circuit's interpretation of the enterprise element, "the predicate acts of racketeering activity, by themselves, do not satisfy the RICO enterprise element."

Chang v. Chen, 80 F.3d 1293, 1299 (9th Cir. 1996) (discussing the minimum requirements for an associated-in-fact enterprise). A RICO plaintiff must allege a structure for the making of decisions separate and apart from the alleged racketeering activities, because "the existence of an enterprise at all times remains a separate element which must be proved." *Id.* (citing *U.S. v. Turkette,* 452 U.S. 576 (1981)).

In this case, Wagh has not alleged a decision-making structure for the enterprise "beyond that which was inherent in the alleged acts of racketeering activity." *Id.* at 1300. *See also Simon v. Value Behavioral Health, Inc.,* 208 F.3d 1073, 1083 (9th Cir. 2000) ("[A] group does not constitute an enterprise unless it exists independently from the racketeering activity in which it engages."). As the district court noted in its second order granting Metris Direct's motion to dismiss,

> The basis of [Wagh's] allegation is apparently that "a normal credit card transaction" between Defendants, Citibank, and [Wagh] is an action sufficient to satisfy the criminal enterprise requirement. Again, however, Plaintiff has failed to meet the enterprise requirements established by the Ninth Circuit in presenting this theory of enterprise. Plaintiff has not alleged that Defendants and Citibank have established a system of making decisions in furtherance of their alleged criminal activities, independent from their respective regular business practices. Nor has Plaintiff alleged that an independent system of distributing the proceeds of money obtained from persons like Wagh exists between the Defendants and Citibank.

Wagh v. Metris Direct, Inc., 2002 WL 257846, at *3.

Wagh has therefore failed to allege the elements of a violation of § 1962(c), and the dismissal of this claim was correct.

D. Wagh's § 1962(d) claim

18 U.S.C. § 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Since Wagh has not satisfied the pleading requirements for any of those subsections, he has also not alleged sufficient facts to state a claim under this section of the RICO statute. Moreover, since all his other RICO claims were dismissed without leave to amend, dismissal without leave to amend this claim was also appropriate. *See Religious Tech. Ctr. v. Wollersheim,* 971 F.2d 364, 367 n.8 (9th Cir. 1992).

III. The District Court's dismissal with prejudice

In addition to his arguments that the district court erred by dismissing his RICO claims without granting leave to amend, Wagh argues that it was error to dismiss those claims with prejudice before remanding his remaining claims to state court, thereby preventing him from pursuing the RICO claims in that forum. He asserts that "the pleading requirements of California state courts for RICO are less stringent than are those of the federal courts."

The district court's Rule 12(b)(6) dismissal with prejudice operates as an adjudication on the merits of the claims under Fed. R. Civ. P. 41(b). Even though state courts have concurrent jurisdiction over RICO actions, *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990), given the

pleading flaws in this case, res judicata bars Wagh from reasserting his RICO claims in state court.

In his response to the first motion to dismiss his RICO claims, Wagh requested that the district court dismiss his § 1962(a) claim without prejudice, asserting that discovery would enable him to plead this claim with greater specificity. The district court's decision to dismiss this claim with prejudice was not an abuse of its discretion. Wagh argues here, as he did before the district court, that he would be able to amend his § 1962(a) claim if the district court allowed discovery. As we discussed above, however, Wagh was not entitled to conduct discovery at this stage of the proceedings because no factual issues were in dispute.

Furthermore, at no point did Wagh request that any of his other RICO claims be dismissed without prejudice so that he could pursue them in state court, nor did he voluntarily dismiss the claims so as to avoid the preclusive effect of a dismissal on the merits.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRISH WAGH, *Plaintiff-Appellant,* v. METRIS DIRECT, INC.; METRIS DIRECT SERVICES, INC.; METRIS COMPANIES, INC.; DIRECTALERT, *Defendants-Appellees.*	No. 02-15580 D.C. No. CV-01-01711-TEH OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
October 7, 2003 – San Francisco, California

Filed November 7, 2003

Before: Betty B. Fletcher, A. Wallace Tashima, Circuit Judges, and Louis H. Pollak, District Judge.*

Opinion by Judge B. Fletcher

COUNSEL

Ernest M. Thayer, San Francisco, California, for the plaintiff-appellant.

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* The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Tomio B. Narita and David B. Moyer, San Francisco, California, for the defendants-appellees.

OPINION

B. FLETCHER, Circuit Judge:

Plaintiff-Appellant Shirish Wagh appeals the United States District Court's Fed. R. Civ. P. 12(b)(6) dismissal of his civil RICO action against Metris Direct, Inc.; Metris Direct Services, Inc.; Metris Companies, Inc.; and Direct-Alert ("Defendants-Appellees" or "Metris Direct") for failure to state a claim. Wagh argues that the district court erred in dismissing with prejudice his claims brought under 18 U.S.C. § 1962(a)-(d). We affirm.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction under 28 U.S.C. § 1291 over an appeal from a district court's dismissal of an action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. We review de novo a dismissal for failure to state a claim, *see Cervantes v. United States,* 330 F.3d 1186, 1187 (9th Cir. 2003), but review denials of discovery and leave to amend for abuse of discretion, *see Panatronic USA v. AT&T Corp.,* 287 F.3d 840, 846 (9th Cir. 2002); *Nat'l Audubon Soc'y, Inc. v. Davis,* 307 F.3d 835, 853 (9th Cir.), *amended by* 312 F.3d 416 (9th Cir. 2002).

FACTUAL AND PROCEDURAL BACKGROUND

Wagh filed this action against Metris Direct in California Superior Court, County of San Francisco, alleging that Metris Direct had caused Citibank, his credit card issuer, to bill Wagh $119.95 for membership in DirectAlert,

an organization which provides credit protection. Wagh alleged that he had not contracted for membership in DirectAlert. In his initial complaint, Wagh sued Metris for fraud, money had and received, declaratory and injunctive relief, and compensatory and punitive damages. Wagh sued on behalf of himself and all others whom he alleged Metris had improperly caused to be billed for such memberships.

After Metris's successful demurrer to Wagh's fraud claim, Wagh filed a first amended complaint in state court. In addition to the remaining original claims for money had and received, and declaratory relief, Wagh alleged that Metris had violated the Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 *et seq.;* the Unfair Business Practices Act, CAL. BUS. & PROF. CODE §§ 17200, 17500; and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* Specifically, Wagh alleged that Metris Direct had violated 18 U.S.C. § 1962(c), which prohibits participation in activities constituting "a pattern of racketeering activity or collection of unlawful debt."

Metris Direct removed Wagh's action to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441(b), asserting federal question jurisdiction. The district court sua sponte ordered Wagh (a) to show cause why his RICO cause of action should not be dismissed for failure to state a claim; (b) to show why in the absence of the RICO claim, the court should not dismiss the case for lack of subject matter jurisdiction; and (c) in the event that he could state a claim under RICO, to file a RICO case statement pursuant to the court's RICO Standing Order.

Wagh filed an amended RICO case statement and, later, an amended complaint.[1] In his amended case statement, Wagh alleged *inter alia* that the Appellees had committed mail fraud because they "caused, and are causing, bills for products and/or services . . . to be sent to plaintiff and the members of his class by the United States Mail. Because none of those recipients either has contracted, or is indebted, therefor, each of those millions of bills has been and is being sent in violation of 18 U.S.C. section 1341." Additionally, Wagh now claimed that Metris Direct had violated all the subsections of the RICO statute.

Metris filed a response to the amended RICO case statement, arguing that Wagh had not stated and could not state a claim under any of the four subsections of the RICO statute. The district court ruled that it would construe Metris Direct's response as a motion to dismiss, and ordered Wagh to respond to the motion. Wagh responded, arguing that he had stated a claim under § 1962(b), (c), and (d), and that if the court dismissed his § 1962(a) claim, it should do so without prejudice.

The district court granted Metris Direct's motion to dismiss, finding that Wagh had failed to plead the RICO mail fraud claim with the requisite specificity. The court found that Wagh would not be able to amend his § 1962(a) and (b) claims, and therefore dismissed them with prejudice. Because his § 1962(c) and (d) claims could be

[1] Wagh had filed a RICO case statement two days earlier, but then filed an amended case statement.

amended to correct the pleading defect, however, the court dismissed them with leave to amend.

Wagh filed a motion for relief from the district court's order, claiming that the court was mistaken in its assertion that, at oral argument on the motion to dismiss, he had conceded inability to cure the pleading defects under § 1962(b) without discovery. The court dismissed the motion for relief from the order under its local Civ. L.R. 7-9(a) because Wagh had failed to obtain leave of the court to file such a motion.

Wagh then filed a second amended complaint in district court, in which he restated his § 1962(c) and (d) claims and sought declaratory and injunctive relief. He now alleged, as a predicate for his RICO claims, that the defendants-appellees had violated 18 U.S.C. § 1343, which prohibits wire fraud, because they "caused, and are causing, bills for products and/or services . . . to be sent to Citibank by wire." The court dismissed Wagh's RICO claims with prejudice, declined to exercise supplemental jurisdiction over the state law claims, and remanded the case to San Francisco Superior Court. *Wagh v. Metris Direct, Inc.*, 2002 WL 257846 (N.D. Cal., Feb. 20, 2002). Wagh appealed.

DISCUSSION

I. The RICO Standing Order

Wagh argues that the district court's use of the RICO Standing Order applies the heightened pleading standards prohibited by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). This is essentially a challenge to the Standing Order as being in conflict with Fed. R. Civ. P. 8(a). As far

as can be determined, this court has never before ruled on the compliance of RICO standing orders with the basic pleading requirements of Rule 8(a) or the stricter pleading requirements of Rule 9(b).

Some district judges in at least four districts in the Ninth Circuit use RICO standing orders. Individual judges in the Northern, Central, and Southern Districts of California, and the District of Hawai'i have issued orders that direct plaintiffs claiming RICO violations to state their allegations in detail and with specificity, including a detailed description of the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. *See Gutierrez v. Givens,* 1 F. Supp. 2d 1077, 1087 (S.D. Cal. 1998) (describing the purpose of such orders as providing "notice to the defendant and the filtering out of meritless complaints"); *May v. U.S. Chamber of Commerce,* 1996 WL 116829 (N.D. Cal. 1996) (ordering the plaintiff to "include a RICO statement consistent with the standing orders of the court"); *Lui Ciro, Inc. v. Ciro, Inc.,* 895 F. Supp. 1365 (D. Hawai'i, 1995) (stating that RICO plaintiffs are required, by a standing order of the court, to file a RICO case statement within 30 days of filing the complaint); *In re Bank of Credit and Commerce Int'l Depositors Litig.,* 1992 WL 696398 (C.D. Cal. 1992) (referring to the Order used in that case).

According to a leading treatise on civil RICO actions, "[m]any federal district courts have issued standing orders in civil RICO cases requesting that plaintiff's counsel provide certain details concerning their RICO claim." DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO App. 9A, 9-100.17 (March 2003) (citing 15 different district courts, in the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, as among those that issue RICO

Standing Orders). Most district courts, including the district court in this case, either adopt verbatim or use a version of the standing order issued by Judge Alvin Krenzler in *Lyman Steel Co. v. Shearson Lehman Bros., Inc.*, Civ. No. C-86-355, 1986 U.S. Dist. LEXIS 29346 (N.D. Ohio 1986).

Despite the widespread use of these orders, however, only three circuits have either directly or indirectly addressed the question of their compliance with notice pleading requirements. In *Figueroa Ruiz v. Alegria,* the First Circuit affirmed in relevant part the district court's dismissal with prejudice of RICO claims for failure to comply with its order "calling for detailed explication of the factual underpinnings of the RICO claims." 896 F.2d 645, 646 (1st Cir. 1990). Upholding the lower court's use of the order to compel greater specificity in the plaintiffs' complaint, the court held that the "need for expeditious and orderly progress of . . . litigation" is particularly pronounced in a civil RICO suit because of its "quasi-criminal" nature and consequent "stigmatizing effect on those named as defendants." *Id.* at 650. Courts should therefore "strive to flush out frivolous RICO allegations at an early stage of the litigation." *Id.* The court found that the order was designed with this goal in mind, and therefore found no abuse of discretion in the district court's dismissal of the RICO claims.[2]

[2] This standard of review was applied because the district court had dismissed the complaint with prejudice under Fed. R. Civ. P. 41(b) for lack of prosecution and disregard of a court order.

The Fifth Circuit has also upheld the use of RICO standing orders at least three times. In *Old Time Enterps. v. Int'l Coffee Corp.*, it held that the district court did not err in "requiring a more specific, clear, and direct statement of the RICO claims." 862 F.2d 1213, 1217 (5th Cir. 1989). Noting that "the Standing Order [served the plaintiff] with notice of the requirements for pleading a RICO claim in accordance with the relevant substantive and procedural rules," *id.* at 1218, the court affirmed the dismissal for failure to state a claim. *Id.* at 1218-19. The court again rejected a challenge to a standing order as being in conflict with Rule 8(a) in *Elliott v. Foufas*, where it held that the order was "entirely consistent with the requirements of Rule 8 that pleadings contain a plain statement of the claim and that pleadings be direct and concise." 867 F.2d 877, 880 (5th Cir. 1989). In late 1990, asserting that such orders are a "useful, sometimes indispensable, means to understand the nature of the claims asserted and how the allegations satisfy the RICO statute," the court wrote that "[t]he propriety of a district court's requirement of a case statement to summarize the nature of RICO claims is . . . well-established in this circuit." *Marriott Brothers v. Gage,* 911 F.2d 1105 (5th Cir. 1990).

The Second Circuit, however, has adopted a more cautious approach to the use of such standing RICO orders. In *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, the district court had dismissed the RICO claim on the alternative ground that the plaintiff had violated its standing order and therefore failed to "furnish information relating to the claim." 271 F.3d 374, 385 (2d Cir. 2001). The court found that the "Standing Order call[ed] for information far in excess of the essential

elements of a RICO claim. . . . To the extent [the order] called for presentation of information going beyond what a plaintiff needs to present to establish a legally sufficient case, plaintiff's inability to produce it could not justify the grant of judgment to defendant." *Id.* at 386.

One key distinction between the First and Fifth Circuit cases on one hand, and the Second Circuit case on the other, is that the former deal with situations in which the alleged predicate offenses were mail or wire fraud, while the latter discussed an action in which the underlying offense was a violation of the Immigration and Nationality Act. As both the First and Fifth Circuits recognized, complaints alleging fraud must comply with both Fed. R. Civ. P. 8(a) *and* 9(b). *See Figueroa Ruiz,* 896 F.2d at 648 n.3; *Old Time Enterps.,* 862 F.2d at 1217. That is, not only must the statement of the claim "show[] that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), but "the circumstances constituting fraud . . . [must] be stated with particularity." Fed. R. Civ. P. 9(b). It is therefore likely that the holdings in the cases affirming the use of RICO Standing Orders were, at least in part, based on the fact that the plaintiffs had failed to plead the fraud claims in sufficient detail.

We find the reasoning of the Second Circuit persuasive. The use of RICO Standing Orders to compel plaintiffs to produce detailed RICO Case Statements, which are then treated by the district court as part of that party's pleadings, can in certain circumstances require far more information from plaintiffs than is required under either Rule 8(a) or 9(b) of the Federal Rules. Nevertheless, in this case, we hold that Wagh's pleadings failed to satisfy even the basic requirements of those rules, and that the dismissal for failure to state a claim was therefore correct.

II. Wagh's RICO claims

A. Wagh's § 1962(a) claim

18 U.S.C. § 1962(a) provides in relevant part:

> It shall be unlawful for any person who has received any income derived, . . . from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, any enterprise.

Section 1964(c) confers standing to bring civil RICO claims only upon those persons "injured in [their] business or property by reason of a violation of section 1962." Read together, these two provisions require that "a plaintiff seeking civil damages for a violation of § 1962(a) must allege facts tending to show that he or she was injured by the use or investment of racketeering income." *Nugget Hydroelectric L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429 (9th Cir. 1992) (joining three other circuits in their application of the 'investment injury' requirement). *See also* SMITH & REED ¶ 6.04[5][a], at 6-101 (listing the cases in which four additional circuits imposed an 'investment injury' requirement for § 1962(a) standing, bringing the total to eight circuits).

Wagh argues that the district court misapplied *Nugget* by requiring him to plead that he was injured by the use or investment of the funds taken from him. Instead, he urges this court to hold that he need only allege that he was injured by the use or investment of funds previously received from others in violation of the mail fraud, wire fraud, and RICO statutes, and that his allegation that the appellees "reinvest in themselves" the income generated

by "the enterprise's pattern of racketeering activity," is therefore sufficient to state a claim.

We disagree, for several reasons. First, both the Supreme Court and this court have held that under § 1964(c), a RICO plaintiff must allege a direct causal link between his injury and the defendant's violation. *See Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 268-69 (1992) (rejecting a reading of the statute that would allow recovery "simply on showing that the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but-for' cause of plaintiff's injury"); *Hamid v. Price Waterhouse,* 51 F.3d 1411, 1419 (9th Cir. 1995) ("In order to plead a civil RICO claim, appellants must show that the defendants' violation of section 1962 was the proximate cause of their injury.").

Second, in *Nugget* we specifically refused to follow the approach of the Fourth Circuit, which had held that a plaintiff may satisfy the standing and pleading requirements for RICO violations by alleging an injury from racketeering acts generating income that was *subsequently* used in violation of § 1962. *Nugget,* 981 F.2d at 437 (declining to adopt the reasoning in *Busby v. Crown Supply, Inc.,* 896 F.2d 833 (4th Cir. 1990)). *Nugget's* holding is applicable here. Noting that *Busby* allowed recovery although "one element of the violation, the use of the proceeds, may not have contributed to or caused the injury," this court concluded that

> [S]ection 1964(c) does not support such a reading, for it would allow an individual to recover for injuries caused by an action that does not constitute a violation of section 1962(a) even though section 1964(c) speaks not of an 'element of a violation' but rather only of a 'violation.' To allow

> recovery for an injury arising from a mere element of a violation, rather than an actual violation, of section 1962(c), we would have to have before us a statute worded differently from the one Congress passed.

Id.

Wagh's argument that he should be allowed to recover for an injury arising from the investment of income gained from a *previous* act of racketeering is similarly unavailing. He has asserted that Metris Direct defrauded him, but has failed to assert that they have injured him by the use or investment of the income derived from the predicate acts of fraud. He has therefore alleged only an element of the RICO violation covered by § 1962(a).

Wagh's reinvestment theory fares no better. Several courts, applying an investment injury requirement, have held that "the acquisition and reinvestment of the proceeds of racketeering activity in the general affairs of an enterprise" does not qualify as investment injury. *See* SMITH & REED ¶ 6.04[5][a], at 6-104 n.226 (citing one Eighth Circuit case, and four district court cases from three different circuits, including *In re Rexplore, Inc. Sec. Litig.*, 685 F. Supp. 1132, 1141 (N.D. Cal. 1988)).

We therefore hold that for Wagh to have standing to sue under §§ 1962(a) and 1964(c), he must have alleged that funds derived from the alleged racketeering activity (mail fraud) were used to injure him. Since Wagh conceded below that he was unable to amend his complaint without discovery, the only remaining question on his § 1962(a) claim is whether he was entitled to discovery.

The district court found that Wagh was not entitled to conduct discovery in order to cure the § 1962(a) pleading

defect. As the court noted in its order granting the first motion to dismiss, discovery at the pleadings stage is only appropriate where factual issues are raised by a Rule 12(b) motion. (citing *Jarvis v. Regan,* 833 F.2d 149, 155 (9th Cir. 1987)). There are no factual issues in dispute with regard to this claim; even if accepted as true, Wagh's allegations are insufficient to state a claim for relief under § 1962(a). The district court did not abuse its discretion in finding that Wagh was not entitled to discovery.

B. Wagh's § 1962(b) claim

18 U.S.C. § 1962(b) provides in relevant part:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise.

In order to state a claim under § 1962(b), a plaintiff must allege that "1) the defendant's activity led to its control or acquisition over a RICO enterprise, and 2) an injury to plaintiff resulting from defendant's control or acquisition of a RICO enterprise." *Sebastian Int'l, Inc. v. Russolillo,* 186 F. Supp. 2d 1055, 1068 (C.D. Cal. 2000) (internal citations omitted). This pleading requirement means that in addition to alleging facts sufficient to assert standing, Wagh must allege "a specific nexus between the control of the enterprise and the racketeering activity." *Sea-Land Serv., Inc. v. Atlantic Pacific Int'l,* 57 F. Supp. 2d 1048, 1055 (D. Hawai'i 1999).

Wagh argues that the district court's dismissal without leave to amend was in error, because although he believes that he has already stated a claim for relief under

§ 1962(b), he would also be able to amend his pleading to satisfy any stricter requirements imposed by the district court, without needing discovery.

Leave to amend is generally within the discretion of the district court. *See, e.g., Nat'l Audubon Soc'y,* 307 F.3d at 853. The district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint. *See, e.g., Chodos v. West Publ'g Co.,* 292 F.3d 992, 1003 (9th Cir. 2002).

Nearly four months passed between April 4, 2001, when Wagh first asserted a RICO claim (under § 1962(c), not § 1962(b)), and July 25, when he responded to the district court's order to show cause. Wagh first claimed a violation under § 1962(b) on July 25 in his amended RICO case statement, but did not include more than the vaguest allusions to the acquisition or maintenance of any interest in or control of the alleged enterprise. Moreover, although Wagh maintains that he is able to amend his pleadings to state a claim under § 1962(b), he has given no indication – either in argument before the district court, or in his briefs to this court – what additional details he could provide without discovery. Given the length of time that Wagh has alleged a violation of the RICO statute (albeit a different section), and the paucity of facts that would establish the bare bones of his claim, we conclude that the district court did not abuse its discretion in dismissing Wagh's § 1962(b) claim without granting leave to amend.

C. Wagh's § 1962(c) claim

18 U.S.C. § 1962(c) provides in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"For the purposes of section 1962(c), RICO plaintiffs must allege a defendant – the 'person' or 'persons' – who is distinct from the enterprise whose business the defendant is conducting." *Sever v. Alaska Pulp Corp.,* 978 F.2d 1529 (9th Cir. 1992). The term "enterprise" is defined in the statute as (1) "any individual, partnership, corporation, association, or other legal entity" and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (West 2003). Wagh's only theory of enterprise on appeal is that the defendants-appellees, two of their employees, and Citibank together constitute the enterprise. He therefore alleges that these corporations and individuals have formed an association in fact.

Under this Circuit's interpretation of the enterprise element, "the predicate acts of racketeering activity, by themselves, do not satisfy the RICO enterprise element." *Chang v. Chen,* 80 F.3d 1293, 1299 (9th Cir. 1996) (discussing the minimum requirements for an associated-in-fact enterprise). A RICO plaintiff must allege a structure for the making of decisions separate and apart from the alleged racketeering activities, because "the existence of an enterprise at all times remains a separate element which must be proved." *Id.* (citing *U.S. v. Turkette,* 452 U.S. 576 (1981)).

In this case, Wagh has not alleged a decision-making structure for the enterprise "beyond that which was inherent in the alleged acts of racketeering activity." *Id.* at 1300. *See also Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083 (9th Cir. 2000) ("[A] group does not constitute an enterprise unless it exists independently from the racketeering activity in which it engages."). As the district court noted in its second order granting Metris Direct's motion to dismiss,

> The basis of [Wagh's] allegation is apparently that "a normal credit card transaction" between Defendants, Citibank, and [Wagh] is an action sufficient to satisfy the criminal enterprise requirement. Again, however, Plaintiff has failed to meet the enterprise requirements established by the Ninth Circuit in presenting this theory of enterprise. Plaintiff has not alleged that Defendants and Citibank have established a system of making decisions in furtherance of their alleged criminal activities, independent from their respective regular business practices. Nor has Plaintiff alleged that an independent system of distributing the proceeds of money obtained from persons like Wagh exists between the Defendants and Citibank.

Wagh v. Metris Direct, Inc., 2002 WL 257846, at *3.

Wagh has therefore failed to allege the elements of a violation of § 1962(c), and the dismissal of this claim was correct.

D. Wagh's § 1962(d) claim

18 U.S.C. § 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the

provisions of subsection (a), (b), or (c) of this section." Since Wagh has not satisfied the pleading requirements for any of those subsections, he has also not alleged sufficient facts to state a claim under this section of the RICO statute. Moreover, since all his other RICO claims were dismissed without leave to amend, dismissal without leave to amend this claim was also appropriate. *See Religious Tech. Ctr. v. Wollersheim,* 971 F.2d 364, 367 n.8 (9th Cir. 1992).

III. The District Court's dismissal with prejudice

In addition to his arguments that the district court erred by dismissing his RICO claims without granting leave to amend, Wagh argues that it was error to dismiss those claims with prejudice before remanding his remaining claims to state court, thereby preventing him from pursuing the RICO claims in that forum. He asserts that "the pleading requirements of California state courts for RICO are less stringent than are those of the federal courts."

The district court's Rule 12(b)(6) dismissal with prejudice operates as an adjudication on the merits of the claims under Fed. R. Civ. P. 41(b). Even though state courts have concurrent jurisdiction over RICO actions, *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990), res judicata bars Wagh from reasserting his RICO claims in state court.

At no point did Wagh request that any of his RICO claims be dismissed without prejudice so that he could pursue them in state court, nor did he voluntarily dismiss the claims so as to avoid the preclusive effect of a dismissal on the merits by the district court. *See Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 505 (2001) (noting that a dismissal without prejudice "will also

ordinarily . . . have the consequence of not barring the claim from other courts"). Wagh is bound by the district court's determination of the insufficiency of his factual allegations.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHIRISH WAGH, Plaintiff, v. METRIS DIRECT, INC., et al., Defendants.	NO. C 01-01711 TEH ORDER GRANTING DEFENDANTS' MOTION TO DISMISS **ENTERED IN CIVIL DOCKET** 2/20/02 (Filed Feb. 20, 2002)

This matter came before the Court on February 11, 2002, on Defendants' motion to dismiss Plaintiff's civil RICO (Racketeer Influenced and Corrupt Organizations Act) claims under 18 U.S.C. § 1962. Having carefully considered the parties' papers, the record herein, and oral arguments, Defendants' motion is GRANTED for the reasons set forth below.

BACKGROUND

Plaintiff Shirish Wagh alleges that in October 2000, he received a credit card bill from Citibank containing an improper charge in the amount of $119.95 for a membership in a credit protection program known as "DirectAlert." DirectAlert is a service provided by Defendants, Metris Direct, Inc. and its subsidiaries. Plaintiff paid the bill, then requested that Defendants refund the money he paid to Citibank. When Defendants refused, Plaintiff filed a purported nationwide class action in San Francisco Superior Court against Defendants, asserting claims of fraud, money had and received, and declaratory relief. Defendants demurred to the fraud claim. The state court

sustained the demurrer and granted Plaintiff leave to amend. In the amended complaint, Plaintiff asserted all of the original claims, except fraud, and added several state-law claims as well as a civil RICO claim under 18 U.S.C. § 1962(c).

Defendants removed the action to this Court and subsequently filed a motion to strike portions of the amended complaint. On June 15, 2001, this Court issued an order to show cause directing Plaintiff to show why the civil RICO claim should not be dismissed for failure to state a claim. The Court also directed Plaintiff to file a RICO case statement in compliance with the Court's RICO standing order. Plaintiff filed an amended RICO case statement on July 25, 2001, claiming violations under 18 U.S.C. §§ 1962(a)-(d). On September 6, 2001, Defendants responded to the amended RICO case statement. Subsequently, this Court ordered that Defendants' response be construed as a Motion to Dismiss.

On November 15, 2001, the Court granted Defendants' Motion to Dismiss Wagh's RICO claims, dismissing Plaintiff's Sections 1962(a) and 1962(b) claims with prejudice, and dismissing his Sections 1962(c) and 1962(d) claims with leave to amend. Wagh filed his Second Amended Complaint on November 30, 2001, seeking declaratory and injunctive relief for violation of Sections 1962(c) and (d), and alleging various state-law claims. Defendants now move to dismiss the remainder of Wagh's RICO claims with prejudice and have the entire action dismissed for lack of subject matter jurisdiction.

LEGAL STANDARD

Dismissal under Rule 12(b)(6) is appropriate when a plaintiff's allegations fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). For purposes of a Rule 12(b)(6) motion, the Court must accept as true all facts alleged in the complaint, construing the allegations in the light most favorable to the plaintiff. *Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir. 2001). In deciding whether a case should be dismissed, a court may generally only consider the complaint. *Lucas v. Dep't. of Corrections,* 66 F.3d 245, 248 (9th Cir. 1995). Dismissal should not be granted unless "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293, 1295 (9th Cir. 1998). If dismissal is warranted, dismissal should be with leave to amend unless it is clear that amendment could not possibly cure the complaint's deficiencies. *Id.* at 1296. That is, leave to amend should be denied where the court determines that the "allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir. 1986).

DISCUSSION

Plaintiff asserts that Defendants' actions constitute the conduct of an enterprise through a pattern of racketeering activity. Defendants contend that Plaintiff has failed to assert RICO claims under Sections 1962(c) and (d).

I. Plaintiff's Section 1962(c) Claim

To state a RICO claim, a plaintiff must demonstrate (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. 18 U.S.C. § 1962 (2001); *Grauberger v. St. Francis Hospital,* 169 F. Supp. 2d 1172, 1176 (N.D. Cal. 2001). In addition, in order to state a claim under Section 1962(c), a RICO plaintiff "must allege a defendant – the 'person' or 'persons' – who is distinct from the enterprise whose business the defendant is conducting." *Sever v. Alaska Pulp Corp.,* 978 F.2d 1529, 1534 (9th Cir. 1992).

The United States Supreme Court has held that, for RICO purposes, an enterprise is an "entity . . . associated together for a common course of conduct." *United States v. Turkette,* 452 U.S. 576, 583 (1981). In the Ninth Circuit, "a RICO enterprise must have an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity." *Chang v. Chen,* 80 F.3d 1293, 1295 (9th Cir. 1996). That is, a RICO enterprise "at a minimum . . . must exhibit 'some sort of structure . . . for the making of decisions, whether it be hierarchical or consensual.' The structure should provide 'some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis.'" *Id.* at 1299 (internal citations omitted). A Court must grant a RICO defendant's motion to dismiss where the plaintiff has failed to "allege a structure to the organization beyond that which [is] inherent in the alleged acts of racketeering activity," and failed to allege that defendants "utilized a structure separate and apart from the predicate acts to distribute proceeds of the transactions." *Id.* at 1300; *see also Simon v. Value Behavioral Health, Inc.,* 208 F.3d 1073 (9th Cir. 2000).

Here, Plaintiff asserts that the RICO enterprise consists of Defendants Metris Companies, Inc., Metris Direct, Inc., Metris Direct Services, DirectAlert, the President and CEO of Metris Companies, Inc., the President of Metris Direct, Inc., and non-party Citibank. Plaintiff sets forth two theories as to how the enterprise requirement has been met. As discussed below, however, neither theory satisfies the *Chang* test, and, therefore, the enterprise element of Plaintiff's RICO claim is not satisfied.

Plaintiff's first theory argues that a parent corporation, its individual officers, and its subsidiaries are legally distinct entities which, taken together, satisfy the enterprise requirement for a Section 1962(c) RICO claim. However, the Court previously rejected this argument as insufficient to meet the RICO enterprise requirement: "For purposes of a single action, a single corporate defendant cannot be both the RICO person and the RICO enterprise under section 1962(c)." (Order Granting Defs.' Mot. to Dismiss, Nov, 15, 2001 at 5) (citing *Sever,* 978 F.2d at 1533-34).

In addition, Plaintiff simply does not allege any facts under this theory that meet the *Chang* test. First, Plaintiff does not allege that an independent decision-making structure existed, which is what *Chang* requires "at a minimum" to sustain an allegation of enterprise. *Chang,* 80 F.3d at 1299. Plaintiff also does not allege any independent proceed-distributing structures on the part of this alleged RICO enterprise. *Id.* at 1300. Consequently, Plaintiff's first theory fails to satisfy the Ninth Circuit's Section 1962(c) RICO enterprise requirements.

Plaintiff's second theory – that Citibank's involvement in billing Plaintiff for charges generated by Defendants satisfies the enterprise requirement under Section 1962(c) – fares no better. The basis of Plaintiff's allegation is apparently that "a normal credit card transaction" between Defendants, Citibank, and Plaintiff is an action sufficient to satisfy the criminal enterprise requirement. (Pl's Opp'n to Mtn. to Dismiss at 9). Again, however, Plaintiff has failed to meet the enterprise requirements established by the Ninth Circuit in presenting this theory of enterprise. *See id.* at 1299-1300. Plaintiff has not alleged that Defendants and Citibank have established a system of making decisions in furtherance of their alleged criminal activities, independent from their respective regular business practices. *See id.* Nor has Plaintiff alleged that an independent system of distributing the proceeds of money obtained from persons like Wagh exists between the Defendants and Citibank. *See id.* Rather, Plaintiff's allegations attempt to impose RICO liability upon Citibank based upon Citibank's regular practices of receiving charges, paying charges, and billing cardholders. This theory has been specifically rejected by the Ninth Circuit, which requires allegations of a structure or system "beyond the racketeering activity itself." *Simon,* 208 F.3d at 1083; *see also Chang,* 80 F.3d at 1299. Therefore, Plaintiff's second theory also fails to satisfy the Ninth Circuit's Section 1962(c) RICO enterprise requirements.

In short, even taking all of the facts alleged by Plaintiff as true, Plaintiff has failed to state a civil RICO claim

under Section 1962(c).[1] At oral argument, Plaintiff requested leave to amend the complaint. However, leave to amend would be futile because Plaintiff cannot allege any facts under either theory of enterprise which satisfy *Chang*. At oral argument, Plaintiff's counsel stated that, if given leave to amend, he would amend the Complaint to allege that "the independent decision-making structure . . . is the officers, employees of the Defendants who determined to implement this fraudulent scheme, the officers, directors and employees who decided to bill persons to whom they had sent this solicitation, whether or not those persons chose to accept the offer," and that the "amendment would further state that not only did the Defendants falsely assert to Citibank that these persons had accepted the offer, that these persons had authorized the Defendants to bill their credit cards, but that Citibank was unaware of the falsity of these assertions, was unaware of the impropriety and falsity of these billings, and therefore, innocently sent the bills . . . to Wagh and his class members, which they should not and would not have done, had they known the falsity of the assertions by the Defendants." RT at 9-10. Plaintiff's counsel also stated that this would be the full extent of his amendment.[2] These proposed

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[1] Plaintiff, in fact, conceded his failure to satisfy the RICO enterprise requirement at oral argument:

The Court:	. . . you haven't satisfied *Chang*; is that where we are? And you would like to amend to satisfy *Change*?
Plaintiff's counsel:	Yes, your honor. (Reporter's Transcript for hearing held on February 11, 2002 at 9) [hereinafter RT].

[2] The Court: Anything further that you would amend so as to comply with *Chang* –

(Continued on following page)

amendments would allege essentially the same facts already alleged, and, more significantly, still allege no facts meeting the *Chang* test. Specifically, the proposed amendments do not describe the separate decision-making structure or independent proceed-distributing structure required by the Ninth Circuit. *Chang,* 80 F.3d at 1299.

Thus, even if the Court were to grant leave to amend, it is clear that Plaintiff would be unable to cure the Section 1962(c) pleading defects. Consequently, this Court DISMISSES Plaintiff's Section 1962(c) claim with prejudice.

II. Plaintiff's Section 1962(d) Claim

Under Section 1962(d), it is "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)" of Section 1962. Where a plaintiff has "failed to allege the requisite substantive elements of RICO, the conspiracy cause of action [section 1962(d)] cannot stand." *Religious Tech. Ctr. v. Wollersheim,* 971 F.2d 364, 367 n.8 (9th Cir. 1992). Here, Plaintiff cannot state a claim under Section 1962(c) under which relief may be granted because he cannot satisfy the enterprise requirement. As discussed above, Plaintiff could not cure the deficiencies of his Section 1962(c) claim even if given leave to amend. Therefore, since Plaintiff cannot satisfy the requirements of his Section 1962(c) claim, Plaintiff's Section 1962(d) claim

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Plaintiff's counsel:	No.
The Court:	– other than what you've told me?
Plaintiff's counsel:	No.
The Court:	Okay. (RT at 10).

must fail as well.[3] Because Plaintiff is unable to cure the Section 1962(d) pleading defects, this Court DISMISSES Plaintiff's Section 1962(d) claim with prejudice.

III. Remaining State Law Claims

The RICO claims under Sections 1962(c) and 1962(d) are the only claims asserted by Plaintiff over which this Court has original jurisdiction. However, district courts "shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). A district court may "decline to exercise supplemental jurisdiction over state-law claims once it has 'dismissed all claims over which it has original jurisdiction.'" 28 U.S.C. § 1367(c)(3); *Ove v. Gwinn,* 264 F.3d 817, 826 (9th Cir. 2001).

Because this Court has disposed of all claims over which it had original jurisdiction, this Court declines to exercise supplemental jurisdiction over Plaintiff's state-law claims. The Court therefore REMANDS Plaintiff's remaining claims to San Francisco Superior Court.

CONCLUSION

Accordingly, and good cause appearing, IT IS HEREBY ORDERED that Defendants' motion to dismiss

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[3] This Court previously dismissed Plaintiff's claims under Sections 1962(a) and (b) with prejudice. (Order Granting Defs.' Mot. to Dismiss, Nov. 15, 2001 at 3-5). Therefore, Plaintiff cannot rely on alleged violations of Sections 1962(a) or (b) to form the basis of his Section 1962(d) claim.

Plaintiff's civil RICO claims is GRANTED with prejudice for the reasons discussed above. Because no federal claims remain in this action, the case is REMANDED FORTHWITH to San Francisco Superior Court for consideration of Plaintiff's state-law claims.

IT IS SO ORDERED.

DATED 2/20/02

/s/ Thelton E. Henderson
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRISH WAGH, Plaintiff-Appellant, v. METRIS DIRECT, INC.; METRIS DIRECT SERVICES, INC.; METRIS COMPANIES, INC.; DIRECTALERT, Defendants-Appellees.	No. 02-15580 D.C. No. CV-01-01711-THE Northern District of California, San Francisco ORDER (Filed Sep. 3, 2003)

Appellant's request for judicial notice filed February 2003 is granted and is ordered filed by direction of the panel assigned to hear the merits of this appeal.

FOR THE COURT
CATHY A. CATTERSON
CLERK OF COURT

By: /s/ Howard Hom
Howard Hom
Deputy Clerk

Supreme Court, U.S.
FILED
APR 16 2004
OFFICE OF THE CLERK

(2)

No. 03-1317

IN THE

Supreme Court of the United States

SHIRISH WAGH,

Petitioner,

v.

METRIS DIRECT, INC.; METRIS DIRECT SERVICES, INC.; METRIS COMPANIES INC.; DIRECTALERT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Ninth Circuit's observation that the doctrine of res judicata would bar the petitioner from reasserting his dismissed RICO claims in state court warrant the grant of certiorari?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondents state that Metris Companies Inc. has no parent corporation, and there are no publicly held corporations that own 10% or more of the stock of Metris Companies Inc. Respondent Metris Companies Inc. is a publicly held corporation and it owns 100% of the stock of respondent Metris Direct, Inc. Respondent Metris Direct, Inc. owns 100% of the stock of respondent Metris Direct Services, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
1. The Ninth Circuit Correctly Observed That The Judgment Dismissing Wagh's RICO Claims Under Rule 12(b)(6) Of The Federal Rules Of Civil Procedure Is Entitled To Claim-Preclusive Effect	3
2. The Ninth Circuit's Opinion In This Case Does Not Conflict With Its Earlier Decision In *Zhang*	7
3. The Ninth Circuit's Opinion Does Not Conflict With *Erie*	8
CONCLUSION	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Cannon v. Loyola University of Chicago, 784 F.2d 777 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) 5

Cartt v. Superior Court, 50 Cal. App. 3d 960 (1975) 9

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 9

Davis v. United States, 417 U.S. 333 (1974) 7

Deposit Bank v. Frankfort, 191 U.S. 499 (1903) .. 4, 6

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 8, 9

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 1, 4, 5, 6, 8

Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273 (1906) 6

Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 1, 5, 6

Stewart v. U.S. Bancorp, 297 F.3d 953 (9th Cir. 2002) 5

Stoll v. Gottlieb, 305 U.S. 165 (1938) 1, 4, 6

Cited Authorities

	Page
Wagh v. Metris Direct, Inc., 2002 WL 257846 (N.D. Cal., Feb. 20, 2002)	3
Wagh v. Metris Direct, Inc., 348 F.3d 1102 (9th Cir. 2003)	3
Wagh v. Metris Direct, Inc., 352 F.3d 1187 (9th Cir. 2003)	3
Zhang v. Dept. of Labor & Immigration, 331 F.3d 1117 (9th Cir. 2003)	7, 8
Statutes:	
18 U.S.C. § 1961	2
18 U.S.C. § 1962(a)	2
18 U.S.C. § 1962(b)	2
18 U.S.C. § 1962(c)	2
18 U.S.C. § 1962(d)	2
28 U.S.C. § 1441(b)	2
Rules:	
Federal Rule of Civil Procedure 12(b)(6)	*passim*
Federal Rule of Civil Procedure 41(b)	6

INTRODUCTION

The Ninth Circuit Court of Appeals affirmed the district court's dismissal with prejudice of the RICO claims asserted by petitioner Shirish Wagh ("Wagh"). Wagh does not challenge this holding. The Ninth Circuit also stated that the district court's dismissal bars Wagh from reasserting those same RICO claims in a subsequent state court action. Wagh incorrectly asserts that this statement by the Ninth Circuit is the "holding" of the decision, and that it "conflicts in principle" with this Court's decision in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

There is no conflict between *Semtek* and the opinion below. *Semtek* held only that the claim-preclusive effect of a federal judgment dismissing a state law claim on statute-of-limitations grounds is determined by the law of the state in which the federal court sits. *Id.* at 508. The decision in *Semtek* did not alter this Court's earlier decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (a district court's dismissal of federal claims under Rule 12(b)(6) is a judgment on the merits entitled to claim-preclusive effect), or its decision in *Stoll v. Gottlieb*, 305 U.S. 165 (1938) (a federal court's adjudication of a right under federal law is entitled to claim-preclusive effect in state courts).

The Ninth Circuit's observation about the claim-preclusive effect of the district court's dismissal of Wagh's RICO claims was entirely consistent with this Court's prior opinions, including *Semtek*, *Moitie*, and *Stoll*. The alleged differences in California state court pleading requirements for RICO claims cannot alter the preclusive effect of the district court's judgment. Accordingly, since Wagh has identified no valid basis for this Court to issue a writ of certiorari, his petition should be denied.

STATEMENT OF THE CASE

Wagh originally filed this action in the Superior Court of California, County of San Francisco, alleging that respondents Metris Direct, Inc., Metris Direct Services, Inc., Metris Companies Inc. and DirectAlert (collectively "respondents" or "Metris") had caused his credit card to be billed $119.95 for a credit monitoring service that he allegedly had not ordered. Petitioner's Appendix ("App.") 4. After the San Francisco Superior Court sustained respondents' demurrer to the fraud claim (*id.*), Wagh filed a first amended complaint which purported to allege, *inter alia*, a violation of Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. App. 4-5.

Based upon the presence of a purported RICO claim, Metris removed the action to the United States District Court, Northern District of California, pursuant to 28 U.S.C. § 1441(b). App. 5. When the district court subsequently directed Wagh to file a RICO case statement pursuant to the court's Standing Order, Wagh asserted that he had stated claims under 18 U.S.C. §§ 1962(a), (b), (c), and (d). *Id.* Metris filed a response to Wagh's RICO case statement, which the district court elected to treat as a motion to dismiss. App. 6. Following a hearing, the court dismissed Wagh's section 1962(a) and (b) claims with prejudice, but granted Wagh leave to amend his section 1962(c) and (d) claims. *Id.*

Wagh filed a second amended complaint containing section 1962(c) and (d) claims, and Metris filed a motion to dismiss. *Id.* On February 20, 2002, after a hearing, the district court issued an order dismissing Wagh's section 1962(c) and 1962(d) claims with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* The court declined to exercise

supplemental jurisdiction over Wagh's remaining state law claims and remanded them to the San Francisco Superior Court. App. 6-7; *Wagh v. Metris Direct, Inc.*, 2002 WL 257846 (N.D. Cal., Feb. 20, 2002).

Wagh appealed to the Ninth Circuit Court of Appeals, and in an order dated November 7, 2003, that court affirmed the dismissal with prejudice of the RICO claims. App. 20-37; *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102 (9th Cir. 2003). Wagh sought rehearing, but the Ninth Circuit denied his petition for rehearing and issued an order which made minor changes to portions of its earlier opinion. App. 2-3; *Wagh v. Metris Direct, Inc.*, 352 F.3d 1187 (9th Cir. 2003).

REASONS FOR DENYING THE PETITION

1. The Ninth Circuit Correctly Observed That The Judgment Dismissing Wagh's RICO Claims Under Rule 12(b)(6) Of The Federal Rules Of Civil Procedure Is Entitled To Claim-Preclusive Effect

The Ninth Circuit affirmed the district court's judgment dismissing each of Wagh's RICO claims with prejudice for failure to state a claim upon which relief can be granted. App. 11-18. In his petition to this Court, Wagh challenges only the passage from the Ninth Circuit's opinion where it correctly observed that "res judicata bars Wagh from reasserting his RICO claims in state court." *Id.* 18-19. This statement is entirely consistent with well-settled principles of res judicata. There is no conflict with the decisions of this Court or those of other circuits, and therefore no basis exists for this Court to issue a writ of certiorari.

Wagh's petition ignores prior decisions by this Court which establish that a district court's dismissal of a federal claim under Rule 12(b)(6) is a final judgment on the merits entitled to res judicata effect in both federal and state courts. *See Moitie*, 452 U.S at 399 n.3, 402 (dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits entitled to claim-preclusive effect); *Stoll*, 305 U.S. at 170-71 (where a judgment of a federal court determines a right under a federal statute, that decision is "final until reversed in an appellate court, or modified or set aside in the court of its rendition.") (quoting *Deposit Bank v. Frankfort*, 191 U.S., 499, 520 (1903)). The Ninth Circuit's observation that the district court's judgment dismissing Wagh's RICO claims with prejudice must be given claim-preclusive effect in the California state courts is entirely consistent with these controlling precedents.

In *Moitie*, the district court dismissed antitrust claims on res judicata grounds because that same court had previously dismissed substantially identical claims asserted by the same plaintiffs. 452 U.S. at 403. Although the Ninth Circuit concluded that res judicata should not apply because the earlier dismissal had "rested on a case that has been effectively overruled," this Court reversed, noting:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment

> may have been wrong or rested on a legal principle subsequently overruled in another case.

Id. at 398 (citations omitted). This Court held in *Moitie* that a "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits'" and held that the district court's judgment of dismissal from the earlier case was res judicata as to plaintiff's federal law claims. *Id.* at 399 n.3, 402.[1] Here, consistent with *Moitie*, the Ninth Circuit correctly noted that the dismissal with prejudice of Wagh's RICO claims under Rule 12(b)(6) bars Wagh from relitigating those claims.

These established res judicata principles were not altered by this Court's decision in *Semtek*, as Wagh implicitly suggests. *Semtek* acknowledged the difference between the preclusive effect of a federal court's judgment on an issue of federal law, and the preclusive effect to be afforded a diversity court's judgment on an issue of state law. 531 U.S. at 506-08. With respect to judgments based on federal law, like the judgment at issue here, *Semtek* observed that this Court has "long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes."

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1. Circuit courts have routinely followed *Moitie* in holding that the dismissal of federal claims under Federal Rule of Civil Procedure 12(b)(6) is entitled to claim-preclusive effect. *See, e.g., Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002) (affirming dismissal of ERISA claims as precluded by prior Rule 12(b)(6) dismissal); *Cannon v. Loyola University of Chicago*, 784 F.2d 777, 780, 782 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) (affirming dismissal of Title IX claims as precluded by prior Rule 12(b)(6) dismissal; Rule 11 sanctions affirmed because plaintiff's claim was "barred by well established principles of res judicata").

Id. at 507 (citing *Stoll*, 305 U.S. at 171-72; *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 290-91 (1906); *Frankfort*, 191 U.S. at 514-15). In fact, *Semtek* cites *Moitie* as one of this Court's leading "cases recognizing the claim-preclusive effect of federal judgments in federal-question cases," *id.* at 504-05, and *Semtek* did not question the holding of *Moitie* that a Rule 12(b)(6) dismissal "is res judicata as to respondents' federal-law claims." *Moitie*, 452 U.S. at 402.

Wagh relies upon a passage from *Semtek* (Pet. 8-9) which notes that a judgment "on the merits" is not necessarily a judgment entitled to claim-preclusive effect. 531 U.S. at 503. But this Court made that statement in the context of explaining that not every dismissal under Rule 41(b) of the Federal Rules of Procedure is entitled to claim-preclusive effect. *See id.* at 501-04. Wagh also relies upon the observation in *Semtek* that the district court's order expressly dismissing a case with prejudice is "a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts." *Id.* at 506. That statement was made to explain the rule governing the claim-preclusive effect of a federal court's dismissal of a state law claim on statute-of-limitations grounds. 531 U.S. at 506-09. *Semtek* did not disturb or question the holding of *Moitie* that a dismissal with prejudice of a federal law claim under Rule 12(b)(6) is an adjudication on the merits entitled to claim-preclusive effect.

Wagh suggests the Ninth Circuit did not refer to *Semtek* in its amended opinion because it could not distinguish *Semtek*. Pet. 10. It is more reasonable to conclude that the Ninth Circuit simply realized that its reference to *Semtek* was unnecessary. In any event, there is no conflict, "in principle" or otherwise, between the decision of the Ninth Circuit and this Court's decision in *Semtek*. Accordingly, the petition should be denied.

2. The Ninth Circuit's Opinion In This Case Does Not Conflict With Its Earlier Decision In *Zhang*

Wagh urges this Court to grant his petition because the decision of the Ninth Circuit in this case allegedly conflicts with the Ninth Circuit's earlier opinion in *Zhang v. Dept. of Labor & Immigration*, 331 F.3d 1117 (9th Cir. 2003). The alleged existence of an intra-circuit conflict is not a valid grounds for seeking review under Rule 10 of the Rules of this Court. *See also Davis v. United States*, 417 U.S. 333, 340 (1974).

There is no conflict between the present case and *Zhang*. Unlike this case, *Zhang* examined whether the district court had properly dismissed a plaintiff's commonwealth claims based upon a ruling by the Supreme Court of the Northern Mariana Islands which barred those claims on statute of limitations grounds. *Zhang*, 331 F.3d at 1118. The Ninth Circuit reversed the dismissal, noting that the plaintiff had timely filed her commonwealth claims in federal court, and concluding that it would be unfair to prevent plaintiff from litigating those claims in federal court simply because they had not been timely filed in the commonwealth court. *Id.* at 1119.

Here, by contrast, the Ninth Circuit held that Wagh's federal law claims under RICO were properly dismissed with prejudice by the district court for failure to allege facts sufficient to constitute a cause of action. App. at 11-18. The Ninth Circuit then correctly observed that res judicata would bar Wagh from reasserting his RICO claims in state

court. *Id.* at 18-19. The holding in *Zhang* is completely inapposite and does not conflict with the Ninth Circuit's opinion below.

Contrary to Wagh's assertion (Pet. 5, 9), there is nothing "unfair" about the Ninth Circuit's opinion in this case. Although in *Zhang* the court noted that it would be "unfair" to apply res judicata principles to the commonwealth claims, 331 F.3d at 1119, there is no generally applicable "unfairness" exception to the doctrine of res judicata, as Wagh suggests. *See Moitie*, 452 U.S. at 401 (the doctrine of res judicata serves "vital public interests" beyond the individual equities of a particular case: "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.") (citations and internal quotation marks omitted).

3. The Ninth Circuit's Opinion Does Not Conflict With *Erie*

Wagh asserts (Pet. 4-5) that the Ninth Circuit's observations about the res judicata effect of the dismissal will somehow result "in the very forum shopping and inequitable administration of the laws which this Court sought to avoid by its decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)." But Wagh makes no attempt to explain how this Court's decision in *Erie*, which held that federal courts have no power to declare substantive rules of federal common law applicable to state law claims, could bear on this federal question case. *See Erie*, 304 U.S. at 78;

see also Chambers v. NASCO, Inc., 501 U.S. 32, 53 (1991) ("*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court."). Nothing in *Erie* would authorize a litigant to continue to pursue federal claims in state court after those claims have been finally adjudicated by a federal court.

Wagh apparently believes that the California state court might have applied a more lenient pleading standard to his RICO claims if those claims had remained in state court. Pet. 3-4, 11-12. Whether Wagh is right or wrong on this issue, it is irrelevant. The RICO claims were properly removed to the district court, and that court entered a final judgment on them. App. 11-18. A writ of certiorari should not be granted based upon Wagh's speculation that the Ninth Circuit's observation about the claim-preclusive effect of the dismissal in this case might encourage other defendants to exercise their right to remove other actions.[2]

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2. Wagh incorrectly suggests that *Cartt v. Superior Court*, 50 Cal. App. 3d 960, 969 n.15 (1975), provides direct support for his statement that

> if, following removal, a district court were to dismiss a plaintiff's RICO counts without prejudice because of the plaintiff's failure to state a federal claim, and then were to remand to the state court, 'only an extraordinarily wealthy, quixotic, and masochistic [defendant] would undertake such a fruitless endeavor' as to remove that same claim again.

(Pet. 11) (bracketed insertion by Wagh). The foregoing excerpt from *Cartt* did not involve a defendant's right to remove a federal question case, or remand of such a case following a dismissal without prejudice. It dealt with the "remote theoretical possibility" that an absent class member might attempt to relitigate issues previously resolved in favor of a class action defendant. *See Cartt*, 50 Cal. App. 3d at 969 n.15.

Finally, the Ninth Circuit did not "recommend" that Wagh should have dismissed his RICO claims without prejudice in order to avoid the res judicata bar – it simply observed that Wagh had failed to do so. App. 19. Wagh's speculative arguments about why such a dismissal "stratagem" might not work for him or other litigants are irrelevant. Pet. 10-12.

CONCLUSION

For each of the foregoing reasons, the respondents respectfully request that this Court deny the petition.

Respectfully submitted,

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